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15 **IN THE UNITED STATES DISTRICT COURT**
16 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
17 **SAN JOSE DIVISION**

18 **In Re: HP Inkjet Printer Litigation**

Master File No. C053580 JF (PVT)

19 **PLAINTIFFS' RENEWED MOTION FOR**
20 **ORDER GRANTING PLAINTIFFS'**
21 **APPLICATION FOR ATTORNEYS' FEES**
AND REIMBURSEMENT OF COSTS AND
EXPENSES

22 This Document Relates To:
23 All Actions

24 **MEMORANDUM OF POINTS AND**
AUTHORITIES AND SUPPORTING
DECLARATIONS AND EVIDENCE FILED
CONCURRENTLY HERewith

25 Date: TBD
26 Time: 9:00 a.m.
Courtroom: 3, 5th Floor
27 Judge: Hon. Jeremy Fogel

28 **PLAINTIFFS' RENEWED MOTION FOR ORDER GRANTING PLAINTIFFS'**
APPLICATION FOR ATTORNEYS' FEES AND REIMBURSEMENT OF COSTS AND
EXPENSES; Master File No. C053580 JF (PVT)

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NOTICE OF MOTION FOR ORDER GRANTING PLAINTIFFS' APPLICATION FOR ATTORNEYS' FEES AND REIMBURSEMENT OF COSTS AND EXPENSES

TO THE COURT, ALL PARTIES, AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on _____, 2014 at 9:00 a.m., or as soon thereafter as it may be heard, in Courtroom ____ of the above-entitled Court, Plaintiffs Daniel Feder, Nicklos Ciolino, Carl K. Rich, David Duran, Jackie Blennis, and David Brickner ("Plaintiffs") will, and hereby do, move for an order:

- (1) Approving an award of attorneys' fees to Class Counsel in the amount of \$1,500,000; and
- (2) Approving an award of reimbursed expenses to Class Counsel in the amount of \$596,990.70.

For the reasons set forth in greater detail in the accompanying Memorandum of Points and Authorities, the Court should grant Plaintiffs' Motion for Order Granting Plaintiffs' Application for Attorneys' Fees and Reimbursement of Costs and Expenses and for Approval of Class Representatives' Stipends.

This Motion is based on this Notice of Motion; the attached Memorandum of Points and Authorities; the Declaration of Samuel G. Liversidge; the original Declaration of Niall P. McCarthy (Dkt. No. 262); the Supplemental Declaration of Niall P. McCarthy; all supporting exhibits, settlement papers (including the Stipulation of Settlement and the Long-Form Notice and Summary Notice, Preliminary Approval Order), and other documents; the pleadings, orders, transcripts, and other papers on file in this matter; and any further evidence and arguments as may

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1 be presented at the hearing of this matter.

2
3 Respectfully submitted,

4 Dated: January 7, 2014

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APPLICATION AND MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs Daniel Feder, Nicklos Ciolino, Carl K. Rich, David Duran, Jackie Blennis, and David Brickner (“Plaintiffs”) respectfully submit this Memorandum of Points and Authorities in support of their Motion for Order Granting Plaintiffs’ Application for Attorneys’ Fees and Reimbursement of Costs and Expenses and for Approval of Class Representatives’ Stipends (“Application”). The first of these consolidated cases was filed over eight years ago.

This Application pertains to the global settlement reached in three separate actions pending before this Court: *In re: HP Inkjet Printer Litigation*, Case No. C05-3580 JF (“*Ciolino*”); *Rich v. Hewlett-Packard Co.*, Case No. C06-03361 JF (“*Rich*”); and *Blennis v. Hewlett-Packard Co.*, Case No. C07-00333 JF (“*Blennis*”), which settlement received preliminary approval by this Court on October 1, 2010 [*Ciolino* Dkt. Nos. 259, 260] (“Preliminary Approval Order”).

By Order dated March 29, 2011, the Court determined that Stipulation of Settlement was fair, reasonable, and adequate and should receive final approval, and granted attorneys’ fees to class counsel in the amount of \$1,500,000 (reduced from the requested \$2,303,009.30), costs in the amount of \$596,990.70, and incentive payments of \$1,000 to each class representative. (Dkt. Nos. 286, 287.)

On May 15, 2013, a split panel of the Ninth Circuit reversed this Court’s award of attorneys’ fees on technical grounds in a lengthy 2-1 decision, and remanded for further consideration. *In Re: HP Inkjet Printer Litig.*, 716 F.3d 1173 (2013). Judge Marsha S. Berzon dissented.

The majority’s reversal was limited to the issue of the method for calculating the fee. The majority clarified that under § 1712(b) of CAFA, “[a] district court may . . . award lodestar fees to compensate class counsel for any non-coupon relief they obtain, such as injunctive relief.” *Id.* at 1187. In accordance with the majority opinion, Class Counsel¹ hereby re-apply for attorneys’

¹ Cotchett, Pitre & McCarthy, LLP; Kabateck Brown Kellner, LLP; Berk Law PLLC; Chavez & Gertler LLP; Cuneo, Waldman & Gilbert, LLC; Edelson & Associates, LLC; The Garcia Law Firm; Law Offices of Michael D. Liberty; Law Offices of Scott E. Shapiro, P.C.; McNicholas & McNicholas, LLP; Pearson, Simon, Soter, Warshaw & Penny, LLP; and Seeger Weiss, LLP.

1 fees, on a purely lodestar basis, with a cross-check based on the value of injunctive relief obtained
2 for the Class.

3 Plaintiffs request this Court approve \$1.5 million in attorneys' fees, supported only on the
4 injunctive relief achieved for the class. As the Declaration of Samuel G. Liversidge makes clear,
5 that relief puts forth a range of important business practice changes that, if the settlement is
6 approved without further appeal, will be of value to current and new inkjet owners. These
7 changes will be available to millions of class members. Indeed this Court has already ruled that
8 the injunctive relief offered the class, although difficult to calculate precisely, has significant
9 value. That value is a cross check against a lodestar of over \$7 million, of which Class Counsel
10 seek only a small fraction: 20%. Class Counsel seek no attorneys' fees based on the value of the
11 e-credits obtained for the Class as part of the Settlement.²

12 **II. FACTUAL BACKGROUND AND LITIGATION HISTORY**

13 **A. Litigation Milestones**

14 **1. Consolidation of Proceedings**

15 By way of the Preliminary Approval Order [*Ciolino* Dkt. Nos. 259, 260], this Court
16 related and consolidated three separate yet intertwined class actions relating to HP inkjet printers
17 and specifically the interplay between those printers and inkjet replacement cartridges: the
18 *Ciolino*, *Rich*, and *Blennis* actions. The three cases were related and consolidated for purposes of
19 effecting this settlement and providing efficient notice to the settlement class.

20 The *Ciolino* action claims that certain HP inkjet printers used "low on ink" messaging
21 technology in a manner that was deceptive and misleading. Plaintiffs allege that these messages
22 prematurely advised consumers that they were low on ink and required a replacement cartridge
23 when in fact the cartridge may have had sufficient amounts of ink remaining.

24 The *Rich* action claims that certain HP color inkjet printers used color ink in addition to
25 black ink when printing black text and images without disclosing this to consumers and without
26 providing consumers with the option of disabling this feature. Moreover, Plaintiffs allege that HP

27 ² The appeal has caused a 3 year delay from when claim forms were submitted to when the e-
28 credits can be redeemed, which will likely drive down the redemption rate.

misrepresented and/or failed to disclose the actual page yield for the products at issue (including the true basis for the page yield and cost per page information provided to consumers). Finally, Plaintiffs' claims assert that HP failed to disclose its use of color ink when printing black in connection with stating its page yields.

The *Blennis* action claims that HP designed certain inkjet printers and cartridges to shut down on an undisclosed expiration date, thereby preventing consumers from using any ink remaining in the expired cartridge and taking advantage of other printer's functions until replacement of the expired cartridge.³

a. The Ciolino Action

On September 6, 2005, Plaintiff Nicklos Ciolino commenced an action against HP in this Court [*Ciolino* Dkt. No. 1] that challenged the "low on ink" ("LOI") warnings deployed on several lines of HP inkjet printers as misleading and deceptive based on the following alleged facts, claims and practices: (1) HP programmed "Smart Chips" or used other LOI messaging technology in its inkjet printers and cartridges to indicate that replacement cartridges were needed despite the fact that the cartridge was often not empty and is capable of additional printing; (2) HP's LOI messages, gauges, warnings, or indicators were deceptive designed leading consumers to prematurely replace their inkjet cartridges; (3) HP's "SureSupply" program and related marketing materials were linked to the deceptive low on ink warnings to facilitate the premature purchase of replacement ink.; (4) Plaintiffs and class members were deprived of the ability to use all of the ink in their HP inkjet print cartridges; and (5) Plaintiffs and class members purchasing the HP inkjet printers and cartridges at issue did not get the full value of what they paid for and were promised.

The operative complaint in the *Ciolino* action (the Second Amended Complaint [*Ciolino* Dkt. No. 36]) asserts claims for alleged violations of California's Unfair Competition Law (Cal. Bus. & Prof. Code § 17200 *et seq.*, "UCL"), California's False Advertising Law (Cal. Bus. & Prof. Code § 17500 *et seq.*), California's Consumers Legal Remedies Act (Cal. Civ. Code § 1750

³ The *Blennis* group is only a small percentage of the class.

1 *et seq.*), and claims for unjust enrichment, breach of express warranty, and breach of implied
2 warranty on behalf of a nationwide class of consumers.

3 HP aggressively defended the lawsuit on both factual and legal grounds. Factually, HP
4 maintained that the low-on-ink messages were hardly confusing and instead straightforward and
5 accurate because they did not explicitly require consumers to replace their inkjet cartridges and
6 instead clearly advised consumers the warning was premised on estimates. Moreover, HP
7 highlighted the fact that these messages merely advised consumers that they were low-on-ink, and
8 that they should consider having a replacement cartridge available for when print quality was no
9 longer acceptable to them.

10 In bridging the gap toward settlement, both sides made significant but rational
11 compromises informed by significant discovery including the review of tens of thousands of
12 pages of documents and scores of depositions. (McCarthy Decl. [Dkt. No. 262] ¶ 8.) Plaintiffs
13 accepted that not all of the low-on-ink messages were deceptive or misleading. However,
14 Plaintiffs maintained that the most confusing of the low on ink warnings were those with graphic
15 images showing near empty cartridges. (*Id.*) While not agreeing with Plaintiffs' position, HP
16 agreed to eliminate those warning in a series of business practice changes.

17 As a result of careful discovery and expert analysis, it was determined that significant
18 individual damages would not be attainable for several reasons. First, despite Plaintiffs'
19 confidence in their ability to establish that HP's "low on ink" warnings were inaccurate, no
20 warning actually and explicitly directs the consumer to "throw out your cartridge," and
21 immediately replace it with a new cartridge. And even if Plaintiffs could convince the Court to
22 award individual damages, it would be extremely difficult to determine how much ink remains in
23 a cartridge when discarded by a consumer (particularly many years after the fact). Accordingly,
24 proving actual damages would necessarily require significant speculation. Thus, Plaintiffs agreed
25 that under the facts of this case it would be fair and reasonable that any cash (or cash-like relief)
26 would be only a part of the total compensation provided to the class. (McCarthy Decl. [Dkt. No.
27 262] ¶ 8.) And given the limited nature of available funds, consumers seeking to take advantage
28

1 of these funds must demonstrate they actually relied on the warnings and reasonably believed
2 they were required to “toss out” cartridges.

3 Further complicating the litigation and increasing the risk substantially of ultimately
4 succeeding was this Court’s decision denying nationwide class certification on July 25, 2008
5 (*Ciolino* Dkt. No. 170.) Although that decision rested on “manageability” grounds, it did limit
6 Plaintiffs to moving forward on their second attempt at class certification with only a California-
7 only state class. Moreover, the court’s companion decision on the same date, albeit denying HP’s
8 Motion for Summary Judgment, included a skeptical discussion of Plaintiffs’ substantive claims
9 and raised doubt as to whether the Court would even approve a statewide class.

10 Plaintiffs continued to aggressively litigate their claims despite long odds but in doing so
11 recognized that that strident negotiation was the best opportunity to assure that the millions of
12 members in the class would receive some relief. (McCarthy Decl. [Dkt. No. 262] ¶ 8.)

13 **b. The Rich Action**

14 On May 22, 2006, Plaintiff Carl K. Rich commenced an action against HP in this Court
15 [*Rich* Dkt. No. 1] based on the following claims and alleged facts and practices: (1) HP failed to
16 disclose that its color inkjet printers use color ink in addition to black ink when printing black text
17 and images (this technology is referred to as “underprinting”); (2) HP failed to provide
18 consumers of HP color inkjet printers with the option of printing black text and images using ink
19 from the black print cartridge only; (3) HP published and made representations regarding the page
20 yield specifications for its inkjet printers and cartridges but misrepresented and/or failed to
21 disclose the actual page yield customers would receive for the products at issue, including the true
22 basis for the page yield and cost per page information provided to consumers; and (4) HP failed to
23 disclose its use of color ink when printing black in connection with stating its page yields for
24 color inkjet printers and cartridges, thereby increasing the actual costs of printing black text and
25 images. The operative complaint in the *Rich* action (the Second Amended Complaint [*Rich* Dkt.
26 No. 33]) asserts claims for alleged violations of the UCL, unjust enrichment, and fraudulent
27 concealment on behalf of a nationwide class of consumers.

1 Plaintiff Rich's original complaint was amended twice. The First Amended Complaint
 2 was filed on September 29, 2006 [*Rich* Dkt. No. 123], to add causes of action for breach of
 3 express warranty and breach of the covenant of good faith and fair dealing (in addition to the
 4 claims discussed above). The Second Amended Complaint was filed on January 12, 2007 [*Rich*
 5 Dkt. No. 33], following the Court's order of December 4, 2006 [*Rich* Dkt. No. 38] granting HP's
 6 Motion to Dismiss. Based on this order, Plaintiffs dropped their claims for breach of contract,
 7 breach of express and implied warranty, and breach of the covenant of good faith and fair dealing.
 8 The Second Amended Complaint (which HP answered on February 28, 2007 [*Rich* Dkt. No. 38])
 9 also introduced an additional plaintiff and proposed class representative (David Duran, a resident
 10 of California) and maintained claims based on unjust enrichment, fraudulent concealment, and
 11 violations of the UCL. In the Second Amended Complaint, Plaintiffs Rich and Duran allege that
 12 HP designed its color inkjet printers to use color ink—in addition to the significantly less
 13 expensive black ink—when printing black and white images and text, in order to force its
 14 customers to prematurely deplete their color ink cartridges and therefore prematurely purchase the
 15 expensive color inkjet cartridges.

16 On June 23, 2009, Plaintiffs filed a motion to certify two classes [*Rich* Dkt. No. 62] —a
 17 damages class consisting solely of California consumers, and a proposed nationwide class for
 18 injunctive relief only. On December 7, 2009, HP filed its Opposition to Plaintiffs' motion for
 19 class certification [*Rich* Dkt. Nos. 80-93], and simultaneously filed a Motion for Summary
 20 Judgment, where it argued, *inter alia*, that: (1) Plaintiffs cannot establish that HP had an
 21 affirmative duty to disclose the allegedly concealed information, and each of their claims fails as a
 22 result; (2) Plaintiffs cannot establish that HP caused them any harm, or that the allegedly
 23 concealed information was material to their purchase decisions, thus entitling HP to summary
 24 judgment on Plaintiffs' fraudulent concealment and UCL claims; and (3) Plaintiffs' purported
 25 "claim" for unjust enrichment fails because it necessarily depends on, and falls with, their other
 26 fraud-based claims. In light of the parties' extensive settlement discussions, neither Plaintiffs'
 27 Motion for Class Certification nor HP's Motion for Summary Judgment has been heard, and this
 28

1 Court took them off calendar for administrative reasons on March 8, 2010, pending the parties'
2 settlement discussions.

3 As with the *Ciolino* action, in bridging the gap toward settlement of the *Rich* action, both
4 sides made significant but rational compromises. Plaintiffs accepted that underprinting is a
5 legitimate and common technology that increases print quality. HP agreed to provide additional
6 disclosures to consumers regarding the use of underprinting, its pros and cons, and measures that
7 can be used to disable it.

8 Moreover, as with the *Ciolino* action, significant individual monetary damages were not
9 appropriate or attainable in *Rich* for several reasons. First, although Plaintiffs were confident they
10 could establish that underprinting caused consumers to use color ink when they would not have
11 expected to, it would be difficult if not impossible to determine how much color ink is actually
12 expended by consumers due to underprinting. Furthermore, it would be difficult to establish that
13 had consumers known about underprinting, they would have chosen to disable it, and thereby
14 sacrifice the benefit of increased print quality due to underprinting. Accordingly, a case to obtain
15 individual damages would be highly speculative and would more than likely not succeed. Thus,
16 Plaintiffs agreed that any cash (or cash-like relief) must be a small percentage of the total
17 compensation provided to the class. (McCarthy Decl. [Dkt. No. 262] ¶ 8.)

18 **c. The Blennis Action**

19 On January 17, 2007, Plaintiffs Jackie Blennis and David Brickner commenced an action
20 against HP in this Court [*Blennis* Dkt. No. 1] based on the following claims and alleged facts and
21 practices: (1) that HP designed certain of its inkjet printers and inkjet cartridges to shut down on
22 an undisclosed expiration date, at which point consumers are prevented from using the ink that
23 remains in the expired cartridge and from using all of the printer's functions (including scanning
24 or faxing documents) until the expired cartridge is replaced; (2) that HP failed to disclose and/or
25 actively concealed information regarding its use of expiration dates in certain of its inkjet printers
26 and cartridges; and (3) that HP interfered with the right of Plaintiffs and the class members to
27 possess and use all of the ink in the HP print cartridges that they purchased.

The original complaint in the *Blennis* action asserts claims for alleged violations of the UCL, fraudulent concealment, unjust enrichment, breach of express warranty, breach of implied warranty, trespass, and conversion on behalf of a nationwide class of consumers. HP filed a Motion to Dismiss the complaint [*Blennis* Dkt. No. 12]. On March 25, 2008, the Court dismissed Plaintiff's claims for express warranty, implied warranty, trespass to chattels and conversion [*Blennis* Dkt. No. 38]. On May 8, 2008, HP answered Plaintiffs' complaint [*Blennis* Dkt. No. 40]. On December 8, 2009, Plaintiffs filed their Motion for Class Certification [*Blennis* Dkt. No. 46], seeking to certify a class consisting of "All persons or entities in the United States who own one or more models of Hewlett-Packard inkjet printers that use ink cartridges that have an expiration date." In light of the parties' extensive settlement discussions, the Motion for Class Certification has not yet been heard.

As with *Ciolino* and *Rich*, significant damages were not appropriate or attainable in *Blennis* for several reasons. First, although Plaintiffs were confident that they could establish that HP employed expiration dates without properly disclosing those dates to consumers, it would be difficult if not impossible to establish which consumers may have hit expiration dates and how much ink, if any, may have remained in the cartridge at the time the expiration date was hit. Furthermore, HP did provide some disclosures to consumers regarding ink expiration, and HP believed that it had legitimate technical reasons for employing ink expiration dates in the limited number of HP printer models where such expiration dates were employed. Accordingly, a case to obtain individual damages would be highly speculative and would more than likely not succeed. Thus, as in the *Ciolino* and *Rich* actions, Plaintiffs agreed that any cash (or cash-like relief) must be a small percentage of the total compensation provided to the class. (McCarthy Decl. [Dkt. No. 262] ¶ 8.)

2. The Parties' Exchange of Information

Plaintiffs' counsel has conducted an extensive investigation into the facts and law relating to the matters alleged in their respective complaints. The investigation included: (1) the depositions of approximately a dozen witnesses; (2) the production of more than hundreds of thousands of documents; (3) more than 100 written discovery requests; (4) the inspection of

several of the HP Inkjet printers at issue; (5) consultations with industry personnel; (6) extensive work with experts including the design and implementation of independent testing; (7) numerous interviews of witnesses and putative members of the classes; (8) the evaluation of information provided by current or former employees of HP (including the HP engineers with primary responsibility for the design of some of the HP inkjet printer models at issue and matters related thereto); and (9) legal research as to the sufficiency of the claims. As a result of the foregoing investigation, Plaintiffs and their counsel obtained comprehensive knowledge of HP's printer technology extending to all three actions. (McCarthy Decl. [Dkt. No. 262] ¶ 9.)

3. Settlement Negotiations and Mediations

Throughout the *Ciolino*, *Rich*, and *Blennis* actions, counsel for the parties engaged in multiple informal but comprehensive settlement discussions, giving due consideration to the parties' respective positions. These discussions took place over several years. Some sessions were productive, others were short and simply reinforced the contrary positions of the parties. (McCarthy Decl. [Dkt. No. 262] ¶ 10.)

Settlement was ultimately reached only after extensive arm's length negotiations between counsel for Plaintiffs in the *Ciolino*, *Rich*, and *Blennis* actions, on the one hand, and counsel for HP, on the other hand, occurring over several years and multiple mediation sessions with several highly respected and nationally-recognized mediators—the Honorable Daniel Weinstein of JAMS (*Ciolino*), the Honorable James L. Warren of JAMS (in the *Ciolino* and *Rich* actions), and Alexander S. Polsky, Esq., of JAMS (*Blennis*). (McCarthy Decl. [Dkt. No. 262] ¶ 10.)

The crux of the settlement eventually reached by the parties provides class members with sufficient information to make a reasoned decision regarding the future purchase of HP inkjet printers and replacement cartridges. To a lesser extent, the settlement provides a limited amount of monetary compensation for the alleged damages sustained by the *Ciolino*, *Rich*, and *Blennis* classes, as described below. (McCarthy Decl. [Dkt. No. 262] ¶ 10.)

B. Key Settlement Terms

The signed settlement is attached as Exhibit B to the Declaration of Niall P. McCarthy (filed in connection with the preliminary approval papers) [*Ciolino* Dkt. No. 253-2]. The

1 following are the key provisions:

2 **1. Injunctive Relief**

3 As discussed above, the *Ciolino*, *Rich*, and *Blennis* actions focus on alleged nondisclosure
 4 of information about certain features of, and technology used in, HP's inkjet printers. The
 5 injunctive relief provided to the Settlement Class addresses the core complaint in each case by
 6 requiring HP to discontinue the use of certain pop-up messages that include the graphic image of
 7 an ink gauge, ruler, or container of ink, and by requiring HP to disclose additional information
 8 regarding the HP technology that forms the basis of the *Ciolino*, *Rich*, and *Blennis* actions on
 9 HP's website (a location where HP customers already obtain information about and can purchase
 10 HP printer products), in the packaging of HP print cartridges, and/or in the user manuals and/or
 11 user interfaces for HP inkjet printers. Specifically, these changes and disclosures include the
 12 following:

- 13 (1) HP will incorporate disclosures into its website, specified user manuals,
 14 and specified user interfaces explaining that HP's low-on-ink messages
 15 (the technology at issue in *Ciolino*) are based on estimated ink levels and
 16 that actual ink levels may vary. HP further will incorporate disclosures
 17 into its website and user manuals explaining that the user does not have to
 replace a print cartridge when a low-on-ink message is received, but
 rather may continue printing until the user is not satisfied with the print
 quality of the printed material or, if applicable, when the user reaches a
 "replace cartridge" message.
- 18 (2) HP will incorporate on its website and in specified user manuals
 19 disclosures regarding "underprinting"—the inkjet technology at issue in
 20 the *Rich* action, whereby certain HP color inkjet printers may, in certain
 21 circumstances depending on the printer settings and customer inputs, use
 22 a combination of inks from the tri-color (or other, non-black color) and
 23 black inkjet cartridges to produce black text and images. These
 24 disclosures will include a description of what underprinting is, why it is
 used, and some of the options for disabling or minimizing the use of
 underprinting. HP also will include disclosures on its website and in user
 manuals regarding page yields including a summary of HP's ISO testing
 for page yields and an explanation that actual yield varies depending on
 the content of printed pages and other factors.
- 25 (3) HP will incorporate disclosures into its website and print cartridge
 26 packaging regarding ink expiration—the technology at issue in the
 27 *Blennis* action, whereby HP may use built-in dates on which certain inkjet
 28 cartridges will stop working—including an explanation of the inkjet
 printers and cartridges that are subject to ink expiration, why HP employs
 ink expiration dates for certain printer models and how that date is
 determined, and how ink expiration works.

1 Class counsel believes that these disclosures achieve the primary objective of the *Ciolino*, *Rich*,
2 and *Blennis* actions.

3 **2. E-Credits**

4 The parties also negotiated some direct monetary relief to the class members in the
5 *Ciolino*, *Rich*, and *Blennis* actions. Given the current litigation posture of the cases, Plaintiffs and
6 their counsel believe that the compensation is fair and reasonable, particularly in light of the
7 denial of class certification in *Ciolino*. (McCarthy Decl. [Dkt. No. 262] ¶ 11.) In settlement of
8 these three matters, HP has agreed to create a pool of up to \$5,000,000 in monetary e-credits that
9 can be used for the purchase of printers or printer supplies online at HP's website
10 (www.shopping.hp.com). (Dkt. No. 253-2 ¶ 38.) Each participating settlement class member in
11 the *Ciolino* action will be eligible to receive up to \$5.00 in e-credits for each *Ciolino* printer
12 model purchased or received as a gift. (*Id.* ¶ 39.) Each participating settlement class member in
13 the *Rich* action will be eligible to receive up to \$2.00 in e-credits for each *Rich* printer model
14 purchased or received as a gift. (*Id.* ¶ 40.) Each participating settlement class member in the
15 *Blennis* action will be eligible to receive up to \$6.00 in e-credits for each *Blennis* printer model
16 purchased or received as a gift. (*Id.* ¶ 41.)

17 There were ultimately 53,147 credits approved for *Blennis* class members, worth a total
18 value of \$318,882.00. (*See* Danielson Decl. [Dkt. No. 285] ¶ 4.) There were 148,479 credits
19 approved for *Ciolino* class members, worth a total of \$742,395.00. (*See id.*) There were 202,176
20 credits approved for *Rich* class members, worth a total of \$404,352.00. (*See id.*) Thus a grand
21 total of 404,802 credits were redeemed by 122,348 class members, worth a total of \$1,465,629.00.
22 (*See id.*)

23 **3. Other Aspects of the Settlement**

24 HP has agreed to pay for the class notice and administration (up to \$950,000), (Dkt. No.
25 253-2 ¶ 59), and class counsel was able to secure very comprehensive notice by utilizing the
26 economies of scale of having the notice combined for the *Ciolino*, *Rich*, and *Blennis* actions.

27 In addition, HP has agreed, subject to Court approval, to pay a stipend not to exceed
28 \$1,000 to each named Plaintiff in the *Ciolino*, *Rich*, and *Blennis* actions. (*Id.* ¶ 47.) HP originally

1 agreed to separately pay to Plaintiffs' counsel the attorneys' fees, costs, and expenses awarded by
 2 the Court, in an amount not to exceed \$2,900,000. (*Id.* ¶¶ 44-45.) This amount was inclusive of
 3 all fees and costs of class counsel in the *Ciolino*, *Rich*, and *Blennis* actions.

4 In its March 29, 2011 Order (Dkt. No. 287), this Court reduced the requested fee amount
 5 from \$2.3 million to \$1.5 million. Costs of \$596,990.70 were approved. Class Counsel now seek
 6 that \$1.5 million, based solely on the injunctive relief obtained. The \$1.5 million in attorneys'
 7 fees represents approximately 20% of the lodestar hours actually worked on the *Ciolino*, *Rich*,
 8 and *Blennis* actions. (McCarthy Decl. [Dkt. No. 262] ¶ 12; Supp. McCarthy Decl. ¶ 3)

9 Finally, in exchange for all of the aforementioned benefits provided by HP under the
 10 settlement, Plaintiffs and members of the *Ciolino*, *Rich*, and *Blennis* classes will fully release HP
 11 from all claims that relate to the *Ciolino*, *Rich*, and *Blennis* actions. (McCarthy Decl. [Dkt. No.
 12 262], Exhibit A, [Stipulation of Settlement, ¶¶ 21, 50-55].)

13 **4. The Reaction of the Class**

14 The reaction of the class was overwhelmingly positive. Notices were sent to
 15 approximately thirteen million people via email, and notice was published in various national
 16 newspapers, magazines and online. (Azari Decl. [Dkt. No. 270] ¶¶ 9-15.) There were three
 17 objections filed with the Court, representing five class members. (*Id.* ¶ 24.) There were 810 class
 18 members who chose to opt out of the settlement. (*Id.* ¶ 23.)

19 These numbers stand in stark contrast to the 403,802 approved credits claimed by 122,348
 20 class members. (Danielson Decl. [Dkt. No. 285] ¶ 4.) This represents an overwhelmingly
 21 positive reaction to the settlement by class members.

22 **III. LEGAL STANDARD**

23 As held by the majority opinion on appeal in this case, “§ 1712(b) [of CAFA] applies in
 24 situations where a coupon settlement also provides for non-coupon relief, such as equitable or
 25 injunctive relief.” *Feder v. Frank (In re HP Inkjet Printer Litig.)*, 716 F.3d 1173, 1183 (9th Cir.
 26 2013). Section 1712(b) states, in pertinent part: “If a proposed settlement in a class action
 27 provides for a recovery of coupons to class members, and a portion of the recovery of the coupons
 28 is not used to determine the attorney’s fee to be paid to class counsel, any attorney’s fee award

1 shall be based upon the amount of time class counsel reasonably expended working on the
 2 action.” 28 U.S.C. § 1712(b). “[T]he language of § 1712(b) is not permissive—if class counsel
 3 wants to be paid ‘any’ fees, and the ‘recovery of the coupons is not used to determine’ those fees,
 4 the entirety of the payment ‘shall be’ calculated ‘based upon the amount of time class counsel
 5 reasonably expended working on the action,’ *i.e.*, using the lodestar method.” *In re HP Inkjet
 6 Printer Litig.*, 716 F.3d at 1183 (emphasis added).

7 The majority opinion further explains that § 1712(c), in contrast to § 1712(b), establishes
 8 this general rule:

9 If a settlement gives coupon and equitable relief and the district court sets
 10 attorneys’ fees based on the value of the entire settlement, and not solely
 11 on the basis of injunctive relief, then the district court must use the value
 of the coupons redeemed when determining the value of the coupons part
 of the settlement.

12 *In re HP Inkjet Printer Litig.*, 716 F.3d at 1184.

13 Thus, if attorneys’ fees are sought solely on the basis of obtaining injunctive relief, a
 14 lodestar approach must be used. If attorneys’ fees are sought based on the entire settlement, the
 15 value of the coupons must be considered. *See id.* The majority opinion described these
 16 alternatives in detail, but did not direct this Court to use any particular approach. *See id.* at 1187
 17 n.19 (“We leave open the question how best to award attorneys’ fees under § 1712.”).

18 In this renewed motion for fees, Class Counsel seek fees based solely on the basis of
 19 injunctive relief obtained in the settlement. Accordingly, the lodestar approach applies. *See id.* at
 20 1184; *see also* 28 U.S.C. § 1712(b)(2).

21 The lodestar approach “involves multiplying the number of hours the prevailing party
 22 reasonably expended on the litigation by a reasonably hourly rate, and, if circumstances warrant,
 23 adjusting the lodestar to account for other factors which are not subsumed within it.” *Staton v.*
 24 *Boeing Co.*, 327 F.3d 938, 965 (9th Cir. 2003); *see also In re HP Inkjet Printer Litig.*, 716 F.3d at
 25 1183 (“Section 1712(b)(2) further confirms that a court may, in its discretion, apply an
 26 appropriate multiplier to any lodestar amount it awards under subsection (b)(1) for obtaining non-
 27 coupon relief.”) (footnote omitted).

The factors that may be used to adjust the lodestar include:

(1) the time and labor required, (2) the novelty and difficulty of the questions involved, (3) the skill requisite to perform the legal service properly, (4) the preclusion of other employment by the attorney due to acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation, and ability of the attorneys, (10) the "undesirability" of the case, (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases.

Kerr v. Screen Actors Guild, Inc., 526 F.2d 67, 70 (9th Cir. 1975). The majority opinion in the Ninth Circuit emphasized the eighth of these *Kerr* factors, stating: "Even under the lodestar method, the district court must adjust the amount of any fees award 'to account for the degree of success class counsel attained.'" *In re HP Inkjet Printer Litig.*, 716 F.3d at 1186 n. 18 (citing *In re Bluetooth*, 654 F.3d at 944; *Hensley*, 461 U.S. at 436).

IV. ARGUMENT

A. Under Section 1712(b), Attorneys' Fees of \$1.5 Million Are Reasonable

Pursuant to the majority opinion's interpretation of § 1712 of CAFA, Class Counsel seek an award of attorneys' fees based solely on the value of the injunctive relief obtained for the Class pursuant to this settlement. Accordingly, § 1712(b) applies, and the Court is required to analyze Class Counsel's request under the lodestar approach. *In re HP Inkjet Printer Litig.*, 716 F.3d at 1186. As detailed in the following sections, under a lodestar approach, Class Counsel's request for \$1.5 million in fees is eminently reasonable. The \$1.5 million request represents only 20% of Class Counsel's total lodestar.

B. Class Counsel Incurred Reasonable Attorneys' Fees Litigating This Case

As of the initial Application for Attorneys' Fees (October 7, 2010), Class Counsel had incurred fees in the amount of \$7,109,247.09 for more than 17,000 hours of time worked on the litigation. (McCarthy Decl. [Doc No. 262] ¶ 23.) In the ensuing three years on appeal, Class Counsel have incurred additional fees in the amount of approximately \$304,472.⁴ (Supp. McCarthy Decl. ¶ 3.) By way of this Motion, Class Counsel seek reimbursement of fees in the

⁴ For purposes of efficiency, Class Counsel limited involvement in the appeal process to two firms.

1 amount of only \$1,500,000. This means that more than *\$5.9 million in fees will go un-*
 2 *reimbursed* and that Class Counsel will recover only 20% of their fees. To put these numbers in
 3 further perspective, out of every five hours Class Counsel worked on this litigation, they will be
 4 paid for only one.

5 The number of hours that Class Counsel spent litigating this case is reasonable. Each of
 6 the firms involved in the litigation made every effort to prevent the duplication of work or
 7 inefficiencies that might have resulted from having multiple firms working on the case.
 8 (McCarthy Decl. [Dkt. No. 262] ¶ 15.) Class Counsel carefully coordinated discovery efforts and
 9 motion practice to ensure that they were working efficiently and productively, and held many
 10 conference calls to discuss strategy and new developments in the case, share knowledge they had
 11 obtained from documents and depositions, and keep one another informed about the status of
 12 various projects. (*Id.* ¶ 15.)

13 The work Class Counsel did was meaningful. Since 2005, Class Counsel undertook
 14 substantial investigation, fact-gathering, and formal discovery, including the following:

- 15 • Reviewing hundreds of thousands of pages of documents;
- 16 • Taking and defending more than a dozen depositions;
- 17 • Propounding and responding to substantial written discovery:
 - 18 ○ Serving more than 100 written discovery requests;
 - 19 ○ Responding to more than a dozen sets of discovery and 434 individual
 - 20 written discovery requests;
- 21 • Conducting a forensic inspection of several of the HP Inkjet printers at issue;
- 22 • Participating in extensive consultations with industry personnel;
- 23 • Handling numerous interviews of witnesses and putative class members;
- 24 • Performing extensive work with experts and testing by the experts, including with
- 25 Dr. Michael A. Kamins, Michael G. Ueltzen, CPA and C. Thomas Avedisian;
- 26 Evaluation of information provided by current or former employees of HP
- 27 (including the HP engineers with primary responsibility for the design of some of
- 28 the HP inkjet printer models at issue and matters related thereto); and

- Conducting substantial legal research.

(McCarthy Decl. [Dkt. No. 262] ¶ 16.)

Class Counsel expended many hours working on dispositive motions. Notably, Class Counsel was required to oppose three separate motions to dismiss, as well as a motion for summary judgment. Class Counsel was also responsible for filing two motions for class certification – including a motion to certify a nationwide class and a motion to certify a California class. (*Id.* ¶ 17.)

Counsel participated in a number of mediation sessions (see Section II(A)(4)(a)). Counsel for the parties engaged in many more years of arm’s length settlement negotiations, and the terms of the settlement that was ultimately reached were heavily negotiated. (McCarthy Decl. [Dkt. No. 262] ¶ 18.) Class Counsel successfully moved for preliminary approval of the settlement. (*Id.* ¶ 18.) Class Counsel have responded to Class members’ questions about the status of the litigation and the settlement, and will continue to do so. (*Id.* ¶ 18.)

Finally, Class Counsel have spent an additional three years—675 hours, representing \$304,522 in attorney time, and \$8,209 in out-of-pocket costs—attempting to defend final approval of the settlement, attorneys’ fees, and costs, on appeal. (Supp. McCarthy Decl. ¶ 3.) The appeal presented a novel issue of first impression that ultimately generated a lengthy split decision. Counsel have performed this work entirely on a contingency basis and have not been compensated for their time. (McCarthy Decl. [Dkt. No. 262] ¶ 18.)

C. The *Kerr* Factors Support the Request

The Ninth Circuit’s majority opinion in this case confirmed that under “Section 1712(b)(2) . . . a court may, in its discretion, apply an appropriate multiplier to any lodestar amount it awards under subsection (b)(1) for obtaining non-coupon relief.” *In re HP Inkjet Printer Litig.*, 716 F.3d at 1183 (footnote omitted).

The factors that may be used to adjust the lodestar include:

- (1) the time and labor required, (2) the novelty and difficulty of the questions involved, (3) the skill requisite to perform the legal service properly, (4) the preclusion of other employment by the attorney due to acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the

circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation, and ability of the attorneys, (10) the “undesirability” of the case, (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases.

Kerr v. Screen Actors Guild, Inc., 526 F.2d 67, 70 (9th Cir. 1975).

Under well-settled Ninth Circuit law, the Court may adjust the unadorned lodestar of \$7,413,769 either up or down, depending on the *Kerr* factors. *See Kerr v. Screen Actors Guild, Inc.*, 526 F.2d at 70. At least 10 of the 12 *Kerr* factors support an upward adjustment in this case. *See Kerr*, 526 F.2d at 70. Nonetheless, Class Counsel seek only a fraction of their lodestar. The only *Kerr* factor that could potentially justify a significant downward adjustment of the lodestar in this case is “the amount involved and the results obtained.” *Id.*; *see also In re HP Inkjet Printer Litig.*, 716 F.3d at 1186 n. 18 (citing *In re Bluetooth*, 654 F.3d at 944; *Hensley*, 461 U.S. at 436) (“Even under the lodestar method, the district court must adjust the amount of any fees award “to account for the degree of success class counsel attained.”).

As the Court previously determined, the results obtained for the Class justify a downward adjustment of the lodestar to a total of \$1,500,000. This downward adjustment is more than sufficient, in light of the injunctive relief obtained by Class Counsel for the Class.

The significant injunctive relief provided to the class addressed the core complaints in each case. The settlement requires HP to: (1) discontinue the use of certain pop-up messaging that includes the graphic image of an ink gauge, ruler, or container of ink; (2) disclose additional information regarding the HP technology that forms the basis of the *Ciolino*, *Rich*, and *Blennis* actions on HP’s website; and (3) disclose additional information in the packaging, manuals, and/or user interfaces for HP inkjet printers. The injunctive relief prevents HP from engaging in what Plaintiffs alleged were the most deceptive and misleading conduct from the complaints.

There is no way to place a precise dollar value on this injunctive relief. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9th Cir. 1998) (“In employment, civil rights and other injunctive relief class actions, courts often use a lodestar calculation because **there is no way to gauge the net value of the settlement or any percentage thereof.**”) (emphasis added); *Officers for Justice v. Civil Service Commission of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982) (“ultimately, the district court’s determination is nothing more than an amalgam of delicate

balancing, gross approximations and rough justice”) (quotation and citation omitted).

However, as described in the Liversidge Declaration, the injunctive relief is significant, and will affect a wide swath of HP’s products. The injunctive relief represents a success, as it approaches all the injunctive relief that Plaintiffs could have achieved had the case gone to trial. In cases where the injunctive relief obtained through a class settlement is equivalent to what would have been achieved through trial, other District Courts have awarded significant multipliers. For example, in *White v. Experian Info. Solutions, Inc.*, 2011 U.S. Dist. LEXIS 79044, 16-17 (C.D. Cal. July 15, 2011) (overruled on other grounds), the District Court for the Central District of California awarded a 1.9 multiplier, because “[the settlement] achieved virtually everything that Plaintiffs could have achieved had they prevailed on their claims for injunctive relief after full litigation.” *See also Kim v. Space Pencil, Inc.*, 2012 U.S. Dist. LEXIS 169922 (N.D. Cal. Nov. 28, 2012) (awarding a 1.18 multiplier because “the settlement prevents Defendant from engaging in the conduct that was the subject of the suit . . .”).

As articulated in the Liversidge Declaration, the injunctive relief contemplated includes material changes to disclosures in connection with: 1) owners’ manuals; 2) product websites; and 3) pop up warnings. These changes will be available to millions of class members.

More specifically, if the Settlement is approved and there are no further appeals, HP will promptly make the following changes:

- (a) HP will discontinue the use of Pop-Up LOI Messages that include the graphic image of an ink gauge, ruler, or container of ink.
- (b) Where HP uses graphic images in the Toolbox to communicate ink level information, HP will include language indicating that the ink level information is an estimate only and that actual ink levels may vary.
- (c) HP’s Pop-Up LOI Messages at the low-on-ink trigger points will use language indicating that the cartridge is low on ink, without stating that a precise level of ink remains, and that HP recommends that the customer have a replacement cartridge available when print quality is no longer acceptable.

1 (d) HP will incorporate disclosures into its website explaining that HP's LOI
2 Messages are based on estimated ink levels and that actual ink levels may vary.
3 HP will further explain that the user does not have to replace a print cartridge when
4 a LOI Message is received, but rather may continue printing until the user is not
5 satisfied with the print quality of the printed material or, if applicable, when the
6 user reaches a "replace cartridge" message. In particular, HP will explain that it
7 provides ink level warnings, indicators, and estimates for planning purposes only,
8 so that users know to have a replacement ink cartridge available if print quality
9 becomes unacceptable. Where applicable, HP also will explain that LOI warnings
10 will not prevent printing, and that users may simply press "enter" to clear the
11 message and continue printing.

12 (e) Going forward for newly introduced HP color inkjet printer models that utilize
13 LOI Messages, HP will incorporate disclosures into its user manuals explaining
14 that HP's LOI Messages are based on estimated ink levels and that actual ink
15 levels may vary. HP will further explain that the user does not have to replace a
16 print cartridge when a LOI Message is received, but rather may continue printing
17 until the user is not satisfied with the print quality of the printed material or, if
18 applicable, when the user reaches a "replace cartridge" message.

19 (f) HP will incorporate on its website disclosures regarding Underprinting, including a
20 description of what Underprinting is, why it is used, and some of the options for
21 disabling or minimizing the use of Underprinting. For example, HP will explain
22 how to use "draft mode" and other options for conserving ink during the printing
23 process (and the corresponding trade-offs in terms of lower print quality). HP also
24 will explain how ink is used generally in the printing process.

25 (g) Going forward for newly introduced HP color inkjet printer models that use
26 Underprinting, HP will incorporate into its user manuals disclosures regarding
27 Underprinting and the available options to disable or minimize the use of the color
28 inkjet cartridge, including the "Print in Grayscale"/"Black print cartridge only"

option and “Draft” mode.

(h) HP will incorporate on its website disclosures regarding Page Yields, including a summary of HP’s ISO testing for Page Yields and an explanation that actual yield varies depending on the content of printed pages and other factors. In particular, HP will explain how it measures page yields on its inkjet printers. HP also will explain how ink is used generally in the printing process and it will provide tips for saving money on printing (such as “print preview,” “draft mode,” printing in black and white only, and other options).

(i) Going forward for newly introduced HP color inkjet printer models, HP will incorporate into its user manuals disclosures regarding Page Yields, including a link to its website regarding Page Yields.

(j) HP will incorporate disclosures into its website regarding Ink Expiration, the inkjet printers and cartridges that are subject to Ink Expiration, why HP employs Ink Expiration dates for certain printer models, and how Ink Expiration works. This will include an explanation of how to determine the ink expiration date.

(k) HP will include on the cartridge packaging for those inkjet cartridges that utilize Ink Expiration dates without an override feature a disclosure indicating that there is an Ink Expiration date and how that date is determined.

HP is thus changing the business practices complained of in these cases, by either discontinuing the practice or providing significant additional disclosures. This widespread dissemination of information will surely provide more information to customers regarding uses of ink and HP’s business practices. These changes, while impossible to precisely value, are surely evidence of the settlement’s degree of success.

Accordingly, while the eighth *Kerr* factor may support a downward adjustment of the lodestar, it does not support more than the 80% adjustment that has already been made.⁵ This is

⁵ Indeed, even in *In re Bluetooth Headset Prods. Liab. Litig.*, 2012 U.S. Dist. LEXIS 168324 (C.D. Cal. July 31, 2012), on remand, the District Court granted attorneys’ fees of **25%** of the lodestar, despite heavy criticism of the value of the settlement. *See id.* at *27 n.4 (“Even the injunctive relief is basic and less than was originally sought.”).

1 especially true given that **10 of the 12** other *Kerr* factors support an upward adjustment of the
 2 lodestar.

3 **IV. CONCLUSION**

4 For the foregoing reasons, Plaintiffs respectfully request that this Court approve their
 5 application for attorneys' fees in the amount of \$1,500,000. Plaintiffs further request that the
 6 Court approve reimbursement of costs and expenses in the amount of \$596,990.70, and stipends
 7 of \$1,000 to each of the Class Representative for their time and efforts on behalf of the Class.
 8 Mr. Frank did not challenge the Court's award of costs and expenses, or Class Representative
 9 stipends, on appeal. Plaintiffs incorporate their prior arguments regarding costs, expenses, and
 10 Class Representative stipends, by reference. (*See* Dkt. No. 261 at 18-20.)

11
 12 Respectfully submitted,

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